

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

PLM

10,355

L/A
FILE: B-194376

DATE: June 4, 1979

MATTER OF: William A. King - [Claim for Retroactive Promotion and Backpay]

*addressee
p. Name data
requestor*

DIGEST: Department of Army GS-9 employee detailed to act as Chief, a position assigned to military officer, is not entitled to a retroactive temporary promotion and backpay under Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977), because he could not have been temporarily promoted into the military personnel position. Also, employee could have availed himself of classification appeal while he was on detail.

This decision concerns a request for reconsideration of our Claims Division Settlement Certificate No. Z-2771890, January 25, 1979, which denied the claim of William A. King for a retroactive temporary promotion and backpay.

The record shows that Mr. King is a civilian employee of the Department of the Army, Fort Knox, Kentucky, who was assigned to the position of Supervisory Training Instructor, GS-1712-09. His major duties required him to serve as Assistant Chief of a branch of a Division in the Automotive Department, and to serve as Branch Chief in the absence of the Chief who was a military officer. Mr. King contends that he is entitled to a retroactive promotion and backpay for the period September 26, 1973, to January 17, 1977, because a military officer was assigned as Chief only for a brief period of time and that he served as Chief during most of the period in question.

Mr. King's request is based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977), which held that employees detailed to higher grade positions for more than 120 days, without Civil Service Commission (CSC) approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The rationale of those decisions was that an agency had no discretion to continue employee details beyond 120 days without CSC approval. When an agency continued a detail without authority, corrective action in the form of a retroactive temporary promotion with backpay was required as of the 121st day of the detail, for the employee, provided the employee was otherwise qualified and could have been temporarily promoted into the position at that time.

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B-194376

The Commission promulgated implementing guidance for our Turner-Caldwell line of decisions in CSC Bulletin No. 300-40 dated May 25, 1977, subject: GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs (B-183086). Paragraph 4 of CSC Bulletin No. 300-40 is relevant to the issue before us and provides in part as follows:

"* * * For purposes of this decision, the position must be an established one, classified under an occupational standard to a grade or pay level. As the decision notes, the Supreme Court recently ruled in United States v. Testan that classification actions upgrading a position may not be made retroactive so as to entitle an incumbent to backpay. Care must be taken to distinguish between employee claims based on details to higher graded positions, and to claims based on a classification action; only the former may be considered for retroactive correction under the decision." (Emphasis in the original.)

A regulation issued by the Army, ^{miscellaneous} C.P.R. 501.5-2a(1)(c) (April 16, 1975), provides that where the position of a Chief of the organization is filled by a military incumbent, a position description will be prepared and evaluated as though it were occupied by a civilian. The position occupied by a civilian Assistant Chief will be evaluated to a lower grade than appropriate for the position of Chief. In the present case no position description for the Chief was made. In view of this and since Mr. King could not have been promoted to a military position, corrective action under our Turner-Caldwell line of decisions is not applicable. Defense Communications Agency, B-183086, July 12, 1977. See also William F. Murray, B-193737, March 14, 1979, wherein it was held that authorization for a higher grade position contained in the Department of the Army Table of Distribution and Allowances does not, by itself, officially establish that position. Mr. King's remedy while serving in the Chief's position was a position classification appeal under the procedures in title 5, Code of Federal Regulations, Part 511. However, that remedy is available only while the employee is performing the duties of the higher position and may not be applied on a retroactive basis. Defense Communications Agency, supra.

Mr. King also states that the failure of the agency to follow its own regulations concerning the Merit Promotion System has cost

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Retroactive promotions
Back pay claims
Temporary Promotions*

B-194376

him over a year's promotion pay. Mr. King apparently is referring to a grievance that he filed on May 24, 1977, wherein he alleges that he was not given proper credit for his experience while detailed and was not promoted to a new GS-11 position. In this connection, he alleges the duties of the new position are the same as those he performed on detail. The classification of positions in the General Schedule is governed by the Classification Act of 1949, as amended, now codified at 5 U.S.C. §§ 5101-5115 (1976). Section 5115 empowers the CSC, now Office of Personnel Management (OPM), to ^{DGL 00925} prescribe the regulations regarding the classification of positions. The regulations of OPM are at title 5 of the Code of Federal Regulations. These regulations provide that the employee may appeal to his agency or to OPM for a review of his classification. See 5 C.F.R. § 511.600 et seq. (1978). However, as previously stated, such reclassification cannot be made retroactively. United States v. Testan, 424 U.S. 392 (1976). See Michael H. Telfer, B-190648, June 16, 1978.

Accordingly, the Claims Division disallowance of Mr. King's claim is sustained.

BAKIN

Deputy Comptroller General
of the United States